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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

SANTA BARBARA SCHOOL
DISTRICTS,

Plaintiff and Appellant,

v.

COMMISSION ON PROFESSIONAL
COMPETENCE OF THE SANTA
BARBARA SCHOOL DISTRICTS,

Defendant and Respondent;

MATEF HARMACHIS,

Real Party in Interest and Respondent.

2d Civil No. B199525
(Super. Ct. No. 1220446)
(Santa Barbara County)

The Santa Barbara School Districts (referred to as District in the singular) sought to dismiss District high school teacher Matef Harmachis. After a hearing, the Commission on Professional Competence of the District (CPC) ordered his retention. The District petitioned for writ of administrative mandate to overturn the CPC's decision, and appeals from the judgment denying the writ. The District contends the trial court failed to exercise its independent judgment in reviewing the ruling by the CPC, the CPC and trial court abused their discretion, and certain findings were not supported by substantial evidence. We affirm.

FACTS AND PROCEDURAL HISTORY

After a 20-year career in journalism, Harmachis became a high school social studies teacher. He began teaching at the District's Dos Pueblos High School in the 2001-2002 school year, received satisfactory performance evaluations, and was tenured at the end of the 2002-2003 school year.

In June 2004, two 10th-grade students visited a class being given by Harmachis. One of the students, A.S., was wearing a T-shirt displaying the Star of David and the words "Israeli Police." As A.S. entered the classroom, Harmachis ordered him to turn his T-shirt inside out or leave the room. After A.S. refused, Harmachis directed him out of the classroom by placing his hand on A.S.'s arm. During an investigation of this incident, the District discovered that Harmachis had made several inappropriate sexual comments to female students during the 2003-2004 school year.

In January 2005, the District gave Harmachis a notice of unprofessional conduct and unsatisfactory performance regarding the T-shirt incident and sexual comments, and transferred him from Dos Pueblos to Santa Barbara High School. In February 2005, Harmachis told a student at his new school to "shut the hell up." In a separate incident, Harmachis attempted to confiscate a prohibited cell phone from a student. Refusing to hand over the phone, the student asserted that Harmachis could not touch him. Harmachis responded, "Touch you? I'll knock your dumb ass out."

In April 2005, the District initiated proceedings to dismiss Harmachis. Pursuant to Education Code section 44944,¹ Harmachis requested a hearing before the CPC to determine whether dismissal was justified.

In its statement of charges, the District alleged Harmachis (1) made disparaging remarks against Israel and used profanity and physical force in the T-shirt incident; (2) made inappropriate sexual comments to female students; and (3) used profanity and threats of violence in the incidents occurring after Harmachis had been transferred. The District alleged that this conduct violated District policies regarding

¹ All statutory references are to the Education Code unless otherwise stated.

religious beliefs, discussion of controversial issues, and sexual harassment. The District sought to dismiss Harmachis on the grounds of immoral conduct, unprofessional conduct, dishonesty, evident unfitness for service, and persistent violation of the state school laws and regulations. (See § 44932, subd. (a).)²

The CPC conducted a hearing over a nine-day period in January 2005. In June 2005, the CPC issued its decision, concluding that Harmachis had engaged in unprofessional conduct but that dismissal was not warranted. The District filed a petition for writ of mandate challenging the CPC's decision. (§ 44945.) The trial court denied the writ.

CPC DECISION

Factual Findings

1. T-shirt Incident

Student K.B. brought students A.S. and Y.S. into Harmachis's classroom during a class at the end of the 2004 school year. K.B. was enrolled in the class but A.S. and Y.S., who are brothers, had taken a semester off to study in Israel and were not enrolled in any classes at the time. Harmachis, however, often allowed visitors into his classroom.

A.S. was wearing a T-shirt displaying the Star of David and the words "Israeli Police." Harmachis incorrectly believed the T-shirt violated the District's dress

² Section 44932, subdivision (a) provides that "[n]o permanent employee shall be dismissed except for one or more of the following causes: [¶] (1) Immoral or unprofessional conduct. [¶] (2) Commission, aiding, or advocating the commission of acts of criminal syndicalism, as prohibited by Chapter 188 of the Statutes of 1919, or in any amendment thereof. [¶] (3) Dishonesty. [¶] (4) Unsatisfactory performance. [¶] (5) Evident unfitness for service. [¶] (6) Physical or mental condition unfitting him or her to instruct or associate with children. [¶] (7) Persistent violation of or refusal to obey the school laws of the state or reasonable regulations prescribed for the government of the public schools by the State Board of Education or by the governing board of the school district employing him or her. [¶] (8) Conviction of a felony or of any crime involving moral turpitude. [¶] (9) Violation of Section 51530 or conduct specified in Section 1028 of the Government Code, added by Chapter 1418 of the Statutes of 1947. [¶] (10) Knowing membership by the employee in the Communist Party. [¶] (11) Alcoholism or other drug abuse which makes the employee unfit to instruct or associate with children." (Fn. omitted.)

code, and told A.S. to leave the room or turn the T-shirt inside out. A.S. laughed and continued walking into the classroom. Harmachis repeated his demand and, when A.S. did not comply, placed his hand on A.S.'s shoulder and walked A.S. out of the classroom. Harmachis said he would speak to A.S. and Y.S. at a later time. While A.S. was outside, student L.J. came into the classroom. Seeing A.S. standing near the door, Harmachis stated, "if you come in you and I are going to box." L.J. stated that he would box A.S. in support of Harmachis. Harmachis did not condone L.J.'s challenge.

Contrary to District allegations, the CPC found that Harmachis did not use profanity during the incident, did not use force in removing A.S. from the classroom, and did not make any "racist or anti-Semitic statements." It found that Harmachis called A.S. and Y.S. "shit heads" in a conversation with the school principal, but no students were present at that time.

2. Sexual Comments to Female Students

Harmachis made inappropriate sexual comments to N.P. and other female students. On one occasion when N.P. was violating school rules by eating in class, Harmachis stated, "Just because you're good in bed doesn't mean you can eat in class." On another occasion, when E.P. brought a bottle of "Naked Juice" to class, Harmachis stated, "It's okay if you come naked to class but you can't drink Naked Juice in my class." On another occasion, Harmachis told N.P. and E.P. that "fucking their boyfriends" would prevent them from achieving their goals. Except for a brief hug of N.P., there was no physical contact by Harmachis with the students. The CPC found that most of the comments were friendly banter, were not reported as unwelcome, did not upset the students or negatively impact their school performance, and were not made with the intent to sexually harass the students.

3. Incidents after Transfer to Santa Barbara High School

The CPC found that, when a student would not stop talking, Harmachis told the student to "shut the hell up." Eleven days later, Harmachis saw a student talking on a cell phone during class. She had borrowed the phone from student N.J.T. and, when Harmachis asked her to give him the phone, she handed it to N.J.T. Harmachis asked

N.J.T. to give him the phone, but N.J.T. refused and placed the phone in his shirt pocket. After several more requests for the phone, Harmachis reached towards N.J.T. to take it. N.J.T. turned away, stating that Harmachis could not touch him. Harmachis stated, "Touch you? I'll knock your dumb ass out." N.J.T. gave Harmachis the phone and later testified that the incident was "no big deal." Harmachis referred to the phone as a "fricking" phone.

4. Fitness to Teach

The reference to boxing with A.S., the sexual comments, and the "shut the hell up" and "knock your dumb ass out" comments showed "unfitness to teach in some respects." Based on mitigating factors, however, the CPC found that the "conduct does not show such unfitness to teach as to warrant dismissal."

Harmachis overreacted in the T-shirt incident, but had authority to maintain order in his class, exclude visitors, and "perceived the shirt as possibly violating school policy." Also, physical contact was "incidental" and the degree of adverse impact on students was minor. The overreaction in both the T-shirt and cell phone incidents was mitigated by Harmachis's desire to maintain classroom control in the face of repeated challenges to his authority. In addition, such conduct is not likely to recur based on instructions to Harmachis to rely on assistance by District office and security staff in any future classroom disruptions. The sexual comments are likely to have had an "adverse impact" on students, but Harmachis did not have "improper or sexual motivations" and "sought to achieve class goals or to counsel students about life choices." There were no mitigating factors regarding his statement to "shut the hell up."

In general, Harmachis presents no danger to his students, and is a relatively new teacher who acknowledges his misconduct. In addition, he is "a popular, spirited teacher who involves students in the learning process," and "his motivation was to advance the learning experience."

Conclusions of Law

The CPC concluded that the statements by Harmachis constituted unprofessional conduct, but not immoral conduct, dishonesty, unsatisfactory classroom

performance, evident unfitness for service, or persistent violation of or refusal to obey school laws or reasonable regulations. (§ 44932, subds. (a)(1), (a)(3), (a)(4), (a)(5) & (a)(7).) The sexual comments did not rise to the level of immorality because they do not show lack of rectitude, corruption, indecency, or depravity. Harmachis did not have a temperamental defect necessary for evident unfitness for service, violation of school regulations could be rectified by anger and classroom management training, and Harmachis's teaching performance was satisfactory.

DISCUSSION

Trial Court Exercised Independent Judgment

The District contends that the trial court failed to exercise its independent judgment in reviewing the CPC's decision, arguing that the court rubber-stamped the CPC's decision without weighing the evidence or making its own findings of fact. We disagree.

A superior court reviewing the factual findings of the CPC "shall exercise its independent judgment on the evidence." (§ 44945; *Governing Board v. Haar* (1994) 28 Cal.App.4th 369, 377; *Pittsburg Unified School Dist. v. Commission on Professional Competence* (1983) 146 Cal.App.3d 964, 976, 978.) The superior court is not bound by the findings or credibility determinations made by the CPC and must independently examine the entire administrative record to determine whether the CPC's findings are supported by the weight of the evidence. (*Haar*, at p. 377; *Pittsburg Unified School Dist.*, at p. 977.)

Nevertheless, "a trial court must afford a strong presumption of correctness concerning the administrative findings, and the party challenging the administrative decision bears the burden of convincing the court that the administrative findings are contrary to the weight of the evidence." (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 817.) In particular, a commission of professional competence which reviews teacher discipline "is a legislatively mandated professional body, with experience and expertise in the area of determining fitness to teach" and its findings are "entitled to substantial weight even in an 'independent judgment' hearing before the superior court." (*San*

Dieguito Union High School Dist. v. Commission On Professional Competence (1982) 135 Cal.App.3d 278, 288.)

Here, the trial court fulfilled its duty to independently review the evidence and the CPC's findings. The trial court issued a detailed written decision which expressly states that the court understood the applicable standard of review. The trial court found Harmachis's conduct was inappropriate and sometimes offensive, but concluded that the CPC's application of relevant case law regarding fitness to teach and the weight of the evidence supported the CPC's finding that Harmachis was fit to teach and should not be dismissed. Also, although the court incorporated the findings of the CPC into its decision, it made additional findings concerning the T-shirt incident, the sexual comments, and the cell phone incident. In making these findings, the court referred to and evaluated testimony by several witnesses.

The District argues that the trial court's reference to the evidence as being "sufficient" and a statement that it would not "second guess" the CPC indicate that the court simply deferred to the CPC findings. Even if the trial court's choice of words was imprecise, an examination of the record as a whole and the entire written decision show that the trial court understood and applied the correct standard of review.

The District also argues that the trial court was obligated to make its own findings of fact and not merely incorporate the CPC findings into its decision. As we have stated, the trial court made factual findings of its own. In any event, there is no prohibition against a court's adopting the findings of an administrative agency when the court concludes that those findings are supported by the evidence. (See *Fontana Unified School Dist. v. Burman* (1988) 45 Cal.3d 208, 215.)

No Abuse of Discretion

The District contends that the CPC abused its discretion in finding Harmachis fit to teach and ordering his retention by the District, and that the trial court abused its discretion in upholding the CPC's ruling. We disagree.

As relevant to this case, a certified public school teacher may be dismissed by a school district for immoral or unprofessional conduct, dishonesty, evident unfitness

for service, or persistent violation of or refusal to obey school laws and regulations. (§ 44932, subd. (a).) Prior to implementation of a decision to dismiss, the teacher has the right to a hearing before the CPC. (§ 44944.) The CPC determines whether the factual charges alleged by the district occurred, and whether dismissal is warranted on the basis of the proven charges. (§ 44944, subd. (c)(1); *Fontana Unified School Dist. v. Burman*, *supra*, 45 Cal.3d at pp. 218-220.) When only dismissal is sought, the CPC can uphold or reverse the district's decision, but has no power to impose a lesser penalty. (§ 44944, subd. (c).)

A finding of statutory grounds for dismissal, however, is not sufficient standing alone to permit the dismissal of a teacher. In *Morrison v. State Board of Education* (1969) 1 Cal.3d 214, 228-230 (*Morrison*), our Supreme Court concluded that section 44932 was vague and potentially overbroad in permitting dismissal for immoral or unprofessional conduct because those terms were not connected to the requirements of the teaching profession. The court held that a certified teacher cannot be dismissed unless the immoral or unprofessional behavior showed that the teacher is "unfit to teach." (*Id.*, at p. 229.) The "fitness to teach" standard was extended to the "evident unfitness for service" ground for dismissal in *Board of Education v. Jack M.* (1977) 19 Cal.3d 691, 696.

Accordingly, to dismiss a teacher on these grounds, there must be findings of immoral or unprofessional conduct or conduct showing evident unfitness for service, together with an additional finding that the misconduct rendered the teacher "unfit to teach." The determination of "fitness to teach" requires consideration of "(1) the likelihood that the conduct would recur; (2) the existence of aggravating or extenuating circumstances; (3) the impact of publicity; (4) the effect on teacher-student relationships; (5) any disruption of the educational process; (6) the employee's motive for the conduct; and (7) the proximity or remoteness in time of the conduct." (*Fontana Unified School Dist. v. Burman*, *supra*, 45 Cal.3d at p. 220, restating *Morrison*, *supra*, 1 Cal.3d at p. 229.)

Furthermore, a commission on professional competence has discretion to require the retention of a teacher despite findings that would support a finding of unfitness to teach. (*Fontana Unified School Dist. v. Burman, supra*, 45 Cal.3d at p. 222.) Section 44932 provides that a teacher cannot be dismissed unless certain grounds are found to exist, but "does not provide that a teacher *must* be dismissed if one of those grounds is found." (*Id.*, at p. 218.) A commission has power "to exercise its collective wisdom and discretion to determine that dismissal is not appropriate in a given case." (*Id.*, at p. 222.)

In addition, the selection of a particular penalty by an administrative agency generally is reviewed under the abuse of discretion standard even where the superior court reviews the evidence under the independent judgment standard. (*Deegan v. City of Mountain View* (1999) 72 Cal.App.4th 37, 45-47.) Neither a trial nor an appellate court can reverse an agency's determination of the appropriate disciplinary action unless the agency has acted arbitrarily or capriciously. (*Id.*, at p. 46; *West Valley-Mission Community College Dist. v. Concepcion* (1993) 16 Cal.App.4th 1766, 1778-1779.)

Here, the CPC and trial court found that Harmachis engaged in unprofessional conduct but remained fit to teach. The District argues that the CPC and trial court acted arbitrarily and capriciously in making that finding in the face of evidence establishing that Harmachis (1) violated District policy, the Education Code and the First Amendment in the T-shirt incident, (2) sexually harassed female students, (3) used profanity in the presence of students, and (4) threatened students with violence. We conclude that, although reasonable minds may differ as to whether conduct by Harmachis was sufficiently egregious to warrant dismissal, the CPC and trial court did not abuse their discretion.

To some extent the District mischaracterizes the evidence and CPC findings. The CPC found unprofessional conduct in the T-shirt incident, the sexual comments, and the use of profanity and threatening language. But, the CPC found a variety of mitigating circumstances, including that there was no repeated use of profanity, the threatening language was not intended to be taken seriously, no racist or anti-Semitic

statements were made, and Harmachis was attempting to maintain classroom control and achieve valid educational purposes. In effect, the District is asking this court to reweigh the evidence by giving greater weight to evidence both the CPC and trial court found unpersuasive.

The CPC and trial court found that A.S.'s T-shirt did not violate school policy, but Harmachis may have believed it did, and reasonably ordered A.S. out of the classroom based on A.S.'s defiance of teacher authority. The District argues that Harmachis's claim that he believed the shirt violated policy was not credible or supported by the weight of the evidence but, as stated, we cannot reweigh the evidence or second guess the factual findings of the CPC and trial court.

The District argues that the sexual comments constituted sexual harassment under the law, but the District did not charge Harmachis with violation of state or federal harassment law, and there was no contention at the hearing that the comments rose to the level of actionable sexual harassment. Moreover, whether characterized as unprofessional conduct or as sexual harassment, the critical standard is not whether the comments were improper but whether they established that Harmachis was unfit to teach.

The District argues that a teacher who uses profanity in the presence of students and who threatens a student with physical force must be dismissed as a matter of law. It is undisputed that Harmachis used profanity on two occasions, but the District does not challenge the finding that it was not used repeatedly, and there is no authority that isolated profanity renders a teacher unfit to teach. It is also undisputed that Harmachis referred to the use of physical force, but the District does not challenge the findings that the comments were not intended to be carried out and were part of an attempt to maintain classroom discipline.

Moreover, the CPC's findings properly reflected consideration of the *Morrison* criteria regarding the likelihood of recurrence, aggravating or extenuating circumstances, the effect on teacher-student relationships, disruption of the educational process, and the employee's motive. The CPC properly evaluated the misconduct in terms of the fitness to teach standard.

The District also argues that there was abuse of discretion in not finding that Harmachis's behavior was immoral and showed evident unfitness for service. (§ 44932, subds. (a)(1) & (a)(5).) As we have stated, dismissal for immoral conduct and evident unfitness for service requires a finding of unfitness to teach. Here, the CPC found one ground for dismissal, unprofessional conduct, but that the conduct did not show Harmachis to be unfit to teach. It is unclear how characterizing the same conduct as immoral or showing evident unfitness for service would have resulted in a different outcome. If Harmachis's conduct did not render him unfit to teach when characterized as unprofessional conduct, the same conduct would not have rendered him unfit to teach if it were characterized as immoral or as showing evident unfitness for service.

In any event, the CPC could reasonably conclude that, although unprofessional, the sexual comments were not immoral because they did not show "lack of rectitude, corruption, indecency, depravity" or indifference "to good order and public welfare." And, the CPC also could reasonably conclude that the misconduct did not show evident unfitness for service. "Evident unfitness for service" as used in section 44932, subdivision (a)(5) is different from the *Morrison* "fitness to teach" standard. Evident unfitness for service requires a finding that a person is unsuitable for teaching due to a temperamental defect or fixed character trait not remediable by training or lesser disciplinary action. (*Woodland Joint Unified School Dist. v. Commission on Professional Competence* (1992) 2 Cal.App.4th 1429, 1444-1445.) Here, even if the CPC had found Harmachis unfit to teach, it could reasonably have concluded that the deficiency was not due to an irremediable temperament or character trait.

Substantial Evidence Supports Findings

The District contends that there was no substantial evidence to support findings that the sexual comments made by Harmachis did not upset female students, and that his conduct in general was motivated by desire to advance the learning experience, his lapses in judgment were unlikely to recur, and he presented no present danger to students. We disagree.

The substantial evidence standard applies to appellate review of the superior court's factual findings in a teacher dismissal case. (*Pasadena Unified School Dist. v. Commission on Professional Competence* (1977) 20 Cal.3d 309, 314.) An appellate court resolves all conflicts in favor of the prevailing party, and gives that party the benefit of all reasonable inferences even when more than one inference can be reasonably deduced from the facts. (*Ibid.*; *Board of Education v. Jack M.*, *supra*, 19 Cal.3d at p. 697.)

The District argues that the sexual comments upset N.P. because she testified that comments directed at her made her feel weird and a little embarrassed. But, N.P. also testified that his comments "didn't upset me" and that she had no interest in making a sexual harassment complaint. And, there was no other testimony regarding the effect of the comments on female students and no evidence that any student complained to school authorities.

The District argues that calling a student a "dumb ass," threatening to "box" with or "knock" a student's "dumb ass out" could not reasonably advance the learning experience because the statements belittled and threatened the student. The District also argues that Harmachis presented a danger to students based on those statements.

These statements were improper and unacceptable as the CPC and trial court concluded in finding that they constituted unprofessional conduct. But, there is evidence to support the conclusion that the statements were an attempt to maintain discipline in the classroom in the face of disobedient behavior by the students. There is also evidence that the threatening language was no more than verbal hyperbole.

The District argues that the CPC could not reasonably find that the misconduct was unlikely to recur because the charges showed that misconduct already had occurred on multiple occasions. There is no evidence, however, that conduct of the type preceding Harmachis's transfer recurred, and the CPC reasonably could conclude that assistance and training in classroom management would prevent recurrence of the post-transfer disciplinary problems.

The District also contends that no substantial evidence supports the findings that his conduct was not immoral and did not show evident unfitness for service. Our prior discussion of these grounds for dismissal applies to the District's substantial evidence argument.

CONCLUSION

The District sought to dismiss Harmachis. Although finding much of his conduct to be unacceptable, the CPC did not find him unfit to teach. The trial court applied its independent judgment and reached the same conclusion. The District did not seek an intermediate sanction, and neither the CPC nor the trial court had authority to impose one. On review, this court cannot conclude that either the CPC or the trial court abused its discretion or that the evidence supporting their findings was insubstantial.

The judgment is affirmed. Costs to respondents.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

GILBERT, P.J.

YEGAN, J.

James W. Brown, Judge
Superior Court County of Santa Barbara

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